No. 08-1011

IN THE

# Supreme Court of the United States

RODNEY REID,

*Petitioner*,

—v.—

UNITED STATES OF AMERICA,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

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## I. This Case is the Proper Vehicle for Resolving the Circuit Split Concerning the Confrontation Clause's Guarantee of a Defendant's Right to Cross-Examine an Accomplice Witness about the Mandatory Minimum Sentence that the Witness Avoided by Cooperating with the Government.

There is a deep division among the federal circuit courts concerning the first question presented in this Petition: whether a defendant's Confrontation Clause rights are violated when the trial court bars the defendant from cross-examining accomplice witnesses about the mandatory minimum sentences that those witnesses avoided by cooperating with the government. Contrary to the government's assertion in its Brief in Opposition ("Gov't Br." 10), the Second Circuit's decision in this case is squarely in conflict with the Third Circuit's opinion in *United States* v. *Chandler*, 326 F.3d 210 (3d Cir. 2003), and the Ninth Circuit's *en banc* opinion in *United States* v. *Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc)—as well as the Delaware Supreme Court's decision in *Wilson* v. *State*, 950 A.2d 634 (Del. 2008). These cases, in turn, are directly at odds with *United States* v. *Luciano-Mosquera*, 63 F.3d 1142 (1st Cir. 1995), and *United States* v. *Cropp*, 127 F.3d 354 (4th Cir. 1997), which ruled in accordance with the court below.[1]

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[1] The government contends that the Seventh Circuit has sided with the First and Fourth Circuits, citing *United States* v. *Nelson*, 39 F.3d 705 (7th Cir. 1994). (Gov't Br. 9.) Although *Nelson* affirmed a district court's decision to bar cross-examination of accomplice witnesses about "the penalties they faced without their plea-bargains," *id.* at 708, it did not

### A. The Government Incorrectly Minimizes the Deep Division Among the Circuits on this Issue.

In *Chandler*, the Third Circuit held that the defendant's Confrontation Clause rights were violated when the district court barred cross-examination of the accomplice witnesses about "the *magnitude* of the sentence reduction they believed they had earned, or would earn, through their testimony" because, had the witnesses been subject to such cross-examination, "the jury might have 'received a significantly different impression of [their] credibility.'" *Chandler*, 326 F.3d at 221 (quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680 (1986)) (alteration in original). The *Chandler* holding directly conflicts with the district court's holding here, affirmed by the Second Circuit, that "the mandatory minimum sentences for the gun counts were of little, if any, probative value." (Pet. App. A33.)

The government contends that *Chandler* "does not squarely conflict" with the Second Circuit's decision in this case because, unlike in *Chandler*, the jury in this case was "well aware of the magnitude of the reduction" that the three cooperating witnesses received. (Gov't Br. 10.) The government's

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distinguish between minimum and maximum sentences or between mandatory sentences and discretionary sentencing ranges. *Nelson* also gave no indication as to the basis for the district court's limitation of cross-examination on this issue or the existence of any concern that the jury would be alerted to the defendant's sentence. As such, *Nelson* does not address the question presented by Mr. Reid here.

argument is based on the faulty assumption that a *maximum* sentence of life plus twenty years is of the same magnitude—and provides the same incentive to fabricate or embellish the witness's testimony—as a *mandatory minimum* sentence of life imprisonment. That assumption defies reason.

If the three accomplice witnesses who testified at Rodney Reid's trial had not cooperated with the government, they would have faced mandatory minimum life sentences: Woodroe Smith would have faced a more than 300-year minimum sentence for the multiple violations of 18 U.S.C. § 924(c) to which he admitted; Dashawn Spratley would have faced a more than 100-year minimum sentence for the multiple Section 924(c) violations to which he admitted; and Omar Jones would have faced a mandatory life sentence for the armed robbery and numerous sales of guns and drugs to which he admitted.

The jury never learned of those facts or appreciated the powerful incentive that those potential sentences provided to those witnesses to embellish or falsify their testimony. To the contrary, Smith and Spratley both testified that they faced only a minimum of ten years' imprisonment and a maximum of life plus twenty years (Trial Tr. 301-03, 592); Jones testified that he had not been required to plead guilty to any federal crimes (Trial Tr. 899-902). The witnesses also testified about the benefit they each hoped to receive for cooperating: Smith, who had been in prison for less than three years at the time of Mr. Reid's trial, testified that he hoped to be sentenced to time served (Trial Tr. 439); Spratley

testified that he hoped to be sentenced only to probation (Trial Tr. 675); and Jones testified that he hoped to avoid any federal charges (Trial Tr. 901-02). Because none of the three cooperating witnesses were required to plead guilty to any of the Section 924(c) charges to which they admitted their guilt, they did not testify regarding—and the jury was not privy to—the lengthy mandatory minimum sentences they would have faced had they not cooperated.

The government compounded the jury's misapprehension when it argued in summation that if the witnesses had not cooperated, they merely faced a minimum sentence of ten years, with the maximum possibility of life plus twenty years. In reality, however, the witnesses' motive was to avoid dying in jail—a starkly more serious punishment, and one that carried a more powerful motive to fabricate or exaggerate their testimony in order to secure a cooperation agreement and a 5K letter from the government.

In short, just as in *Chandler*, the jury here was not aware of the astoundingly large benefit that the witnesses actually received by cooperating. The government's argument that this case is "easily distinguished" from *Chandler* on the grounds that Mr. Reid's jury was "well aware of the magnitude of the reduction" that the three cooperating witnesses received (Gov't Br. 10) and, thus, that there is not a split between the Second and Third Circuits, is unavailing.

Additionally, and again contrary to the government's assertion, the Ninth Circuit's decision

in *Larson* directly conflicts with the Second Circuit's decision in this case. In *Larson*, the Ninth Circuit unambiguously held that a court violates the Sixth Amendment when it prevents a defendant from cross-examining an accomplice witness about the mandatory minimum sentence he avoided by cooperating in order to keep the jury from learning about the mandatory minimum sentence applicable to the defendant. *Larson*, 495 F.3d at 1102-07. The government attempts to minimize this clear holding by emphasizing that the Ninth Circuit found the constitutional error there to be harmless error. (Gov't Br. 9-10.) But the fact that the constitutional error may have been harmless given the facts of that case does not change the unambiguous holding that the barring of such examination is unconstitutional.

Here, the district court held that "the mandatory minimum sentences for the gun counts were of little, if any, probative value on the incentive to lie of cooperators who acknowledged facing life plus 20 years." (Pet. App. A33.) The Second Circuit affirmed that holding. (Pet. App. A61-A62.) But as the Ninth Circuit explained, such testimony does not allow the jury to fully appreciate a witness's bias: "The potential maximum statutory sentence that a cooperating witness *might* receive . . . is fundamentally different from the *mandatory* minimum sentence that the witness *will* receive in the absence of a motion by the Government." *Larson*, 495 F.3d at 1106. "The former lacks significant probative force because a defendant seldom receives the maximum penalty permissible under the statute," whereas the latter "is a sentence that the witness knows *with certainty* that he will

receive unless he satisfies the government with substantial and meaningful cooperation so that it will move to reduce his sentence." *Id.* The district court's ruling barring cross-examination about the mandatory minimum sentences the accomplice witnesses avoided prevented the jury from adequately assessing the witnesses' bias because "*any* reduction from a mandatory life sentence is of such a significant magnitude that excluding this information denie[s] the jury important information necessary to evaluate [the witnesses'] credibility." *Id.* at 1107.

*Chandler* and *Larson* are directly at odds with the decision of the Second Circuit in this case and with the decisions of the First and Fourth Circuits in *United States* v. *Luciano-Mosquera*, 63 F.3d 1142 (1st Cir. 1995), and *United States* v. *Cropp*, 127 F.3d 354 (4th Cir. 1997). In those cases, the Second, First, and Fourth Circuits held that a district court may bar cross-examination of an accomplice witness about the mandatory minimum sentences he would have faced had he been charged with additional crimes on the grounds that such examination would impermissibly inform the jury about the defendant's possible punishment. These decisions were in error, and this Court should grant the Petition to resolve the circuit split on this important issue.[2]

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[2] The government argues (Gov't Br. 9 n.1) that the historical practices Mr. Reid discussed in his opening brief (Pet. 14-19) are irrelevant. To the contrary, the fact that English and colonial juries knew or were told of the sentence a defendant faced demonstrates that courts in 1791 would not have abridged a defendant's Confrontation Clause rights simply to

**B. Rodney Reid's Confrontation Clause Claim was Properly Preserved Because the Claim was Raised in the District Court and on Appeal.**

The government suggests that Mr. Reid's Confrontation Clause claim was not properly preserved. (Gov't Br. 11.) This is incorrect.[3] The Sixth Amendment claim asserted by Mr. Reid in this Court was raised both in the district court and in the Second Circuit.

First, during cross-examination of Smith, defense counsel elicited that Smith had not been required to plead guilty to any of the 13 violations of Section 924(c) to which he had admitted. Counsel then tried to elicit Smith's understanding of the penalty that he had avoided as a result. On the prosecutor's objection, the district court barred that line of questioning, despite defense counsel's argument that he was "entitled to explore [Smith's] recollection on the 924(c) count" because "[t]his goes directly to the deal struck with the government. 13 times he committed firearms crimes. He didn't plead guilty one single time." (Trial Tr. 435-36.) Likewise, during Spratley's cross-examination the following day, defense counsel sought to elicit the mandatory minimum sentence Spratley avoided by not being

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prevent the jury from learning of the defendant's applicable mandatory minimum sentence.

[3] Tellingly, the government's Brief in Opposition to this Court is the first time that the government suggests that Mr. Reid's Confrontation Clause claim was not preserved. The government did not raise this argument in the Second Circuit.

required to plead guilty to the five armed robberies to which he admitted. The court again sustained the prosecutor's objection.

Before the testimony of Jones, the third accomplice witness, defense counsel orally moved the court to reconsider its ruling on this issue. (*See* Pet. App. A5-A10.) The court reiterated its ruling that the defense could not cross-examine Jones about the mandatory minimum sentence he avoided because it would alert the jury that Mr. Reid faced a similar mandatory minimum sentence. Defense counsel responded:

> I am not going to stray from this because I have your ruling but I will object. This is restraining our defense on a critical point because of the impact it would have on this jury if they understood that these witnesses are going to be given a deal that in some cas[es] avoids 55 years of mandatory time.

(Pet. App. A6.)

Second, Mr. Reid's post-trial motion for a new trial devoted several pages to the argument that the district court violated his "rights under the Confrontation Clause of the Sixth Amendment" when it refused to allow defense counsel "to cross-examine the co-conspirators concerning the mandatory minimum sentences carried by the firearms charges with which the co-conspirators were not charged pursuant to their cooperation agreements." (*See* Mem. of Law in Support of Defendant's Motion for

Judgment of Acquittal and/or New Trial 14-18.) In support of that motion, Mr. Reid specifically cited and discussed the Third Circuit's decision in *Chandler*, 326 F.3d 210.

Third, on appeal in the Second Circuit, Mr. Reid argued that the district court violated his Confrontation Clause rights "by refusing to permit defense counsel to cross-examine the government's cooperating witnesses concerning the mandatory minimum sentences carried by the firearms charges with which they were not charged." (*See* Def. C.A. Br. 17-21.)

In sum, the record clearly demonstrates that Mr. Reid preserved his Confrontation Clause claim for review by this Court.

**C. The Constitutional Error by the Lower Courts was not Harmless Beyond a Reasonable Doubt.**

The government argues that any constitutional error committed by the lower courts in this case was harmless beyond a reasonable doubt. (Gov't Br. 12.) This Court's precedent compels a contrary conclusion. In *Delaware* v. *Van Arsdall*, 475 U.S. 673, 684 (1986), the Court held that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis." The Court explained that that inquiry depends on a number of factors, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence

corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case." *Id.*

Here, application of the *Van Arsdall* factors demonstrates that the constitutional error was not harmless beyond a reasonable doubt. The testimony of the three accomplice witnesses was critical to the prosecution's case because it was the *only* evidence that Mr. Reid participated in four of the five armed robberies for which he was convicted—the witnesses' testimony about Mr. Reid's connection with these four robberies was not corroborated by any other evidence.[4] No physical evidence connected Mr. Reid to these four robberies—no fingerprint evidence implicated Mr. Reid, he could not be identified on any surveillance video, and fingerprint and ballistics evidence implicated only Spratley, Smith, and another accomplice. In addition, none of the more than ten victims who testified for the prosecution could identify Mr. Reid or testify to having ever seen him before.

Had the jury been alerted to the true magnitude of the benefit the accomplice witnesses earned by testifying, it would necessarily have made a more discriminating appraisal of the witnesses' credibility and would likely have discounted their

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[4] These four robberies were charged in counts 2, 4, 6, and 8 of the indictment; the firearms violations associated with these robberies were charged in counts 3, 5, 7, and 9. There was some corroborating evidence of Mr. Reid's participation in the robbery charged in count 14 and the associated firearms violation charged in count 15.

uncorroborated testimony concerning Mr. Reid's involvement in those robberies.

In short, the witnesses' testimony was critically important to the government's case, was not cumulative of other evidence, and was not corroborated by any other evidence. *See id.* As such, the district court's unconstitutional limitation of the cross-examination of those witnesses could not have been harmless beyond a reasonable doubt.

## II. The Prosecutors' Unreasonable Decision to Stack Multiple Section 924(c) Charges against One Defendant—Mandating A Life Sentence—Violates the Separation of Powers Doctrine by Uniting the Power to Prosecute and the Power to Sentence in the Executive Branch.

The government contends that prosecutorial charging decisions must be upheld so long as they do not violate the Equal Protection Clause. (*See* Gov't Br. 12 (arguing that prosecutorial charging discretion is constitutionally exercised "unless it improperly relies on race, religion, ethnicity, or some other protected characteristic").) This assertion is wrong: charging decisions must conform to *all* constitutional requirements, not just the Equal Protection Clause. Here, the government's charging decision violated the separation of powers doctrine and due process, and resulted in Mr. Reid receiving a sentence that was over 100 years greater than those received by his similarly situated co-conspirators.

In its attempt to refute Mr. Reid's argument that the application of Section 924(c) in this case violated the separation of powers doctrine by impermissibly uniting the power to prosecute and the power to sentence within the Executive Branch, the government ignores the Court's reasoning in *United States* v. *Booker*, 543 U.S. 220 (2005), and *Mistretta* v. *United States*, 488 U.S. 361 (1989). The holdings in those cases were based in part on the Court's concern over vesting the Executive Branch with sentencing discretion. Here, by charging Mr. Reid with seven Section 924(c) violations, the government assured that Mr. Reid, if convicted, would die in prison. The court was left powerless to mitigate the unconscionable result. This Court should grant certiorari because allowing the government to unilaterally impose a mandatory life sentence on a defendant—where that sentence bears little, if any, relation to the defendant's real conduct—violates both the separation of powers doctrine and the defendant's Fifth Amendment right to due process.

## CONCLUSION

For the foregoing reasons and the reasons cited in Mr. Reid's opening brief, the Court should grant a writ of certiorari in this case.

Respectfully submitted,

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